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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of
LIBERTY PRODUCTIONS,
A LIMITED PARTNERSHIP
Et. Al.

) MM Docket No. 88-577
)
) File No. BPH-870831MI
)
)
)

For Construction Permit for
New FM Channel 243A
Biltmore Forest, North Carolina

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To: The Commission

REPLY TO
RESPONSE TO SUPPLEMENTAL BRIEF

Liberty Productions, a Limited Partnership ("Liberty") by counsel herewith submits its reply to the Response to Supplemental Brief, filed by Orion Communications, Limited ("Orion") on January 7, 2000 in the above referenced proceeding. In support whereof the following is shown:

1. Orion devotes the majority of its Response to arguing that the Commission may not revisit site availability issue. While, as Liberty argued in its Supplemental Brief, the favorable resolution of that issue would obviate any possibility that there was any misrepresentation, the Commission need not address the site availability issue to resolve the misrepresentation issue. That course of action was suggested primarily because it avoids the need for the Commission to make determinations regarding Valerie Klemmer Watts' ("Klemmer") state of mind. With respect to the misrepresentation issue, Orion points to no evidence that would suggest that Klemmer intended to deceive the Commission. Furthermore, even its attempt to suggest a motive for deception is entirely speculative and contrary to the known facts.

2. Orion argues (at p. 3) that the Commission may not revisit the site availability issue, because it previously affirmed the Review Board's decision. In so arguing, however, Orion does not explain why the

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Commission is so precluded and cites no precedent to support its position. More importantly, Orion conveniently overlooks the fact that the D. C. Circuit Court of Appeals reversed and remanded the Commission's orders in this proceeding by Order filed March 15, 1994 in Case No. 92-1645.

3. Orion's argument also ignores the fact the Commission never addressed the site availability issue in any event. In response to Liberty's Application for Review, the Commission affirmed the the Board's decision without comment. 7 FCC Rcd. 1703. In response to Liberty's Petition for Reconsideration, the Commission again simply affirmed the Board's disqualification of Liberty without addressing the issue. 7 FCC Rcd. 7586. In so doing the Commission simply noted that, pursuant to Section 1.115(g) of its Rules, it is not required to specify reasons for its decisions. Id. at 7591.

4. Orion also objects (at p. 3-5) that Liberty is attempting to re-argue matters which have already been resolved. In this regard, Orion identifies three such arguments: that the ALJ improperly pre-judged the added issues prior to hearing, that Utter's testimony is not reliable or credible and that the ALJ ignored the testimony of Warner. To support its argument Orion simply attempts to demonstrate that Liberty advanced each of these arguments previously.

5. However, Orion fails to provide any evidence that the Commission or even the Board ever addressed any of these issues. The fact is that neither did. ¹/ Nor has Orion presented any plausible reason why the Commission cannot consider Liberty's arguments, at least to the extent that they impact the resolution of the misrepresentation issue. Furthermore, as noted above, Orion's arguments ignore the fact that the Commission's orders in this proceeding were appealed by Liberty and reversed by the Court of Appeals in 1994. See: Order filed March 15, 1994 in Case No. 92-1645. Accordingly, its contention that there exists some "law of the case" which would be

1. See: 7 FCC Rcd. 1703 (1992); 7 FCC Rcd. 7586 (1992);
6 FCC Rcd. 1978 (RB 1991)

violated were the Commission to revisit the site availability issue or any arguments Liberty has advanced previously, is clearly obviated by the Court's action in any event.

6. Orion claims that the resolution of the site availability issue was supported by the "verified statements" of Vicky Utter ("Utter"). ²/ However, only Utter's February 22, 1989 Affidavit was verified and, as Liberty has demonstrated, she subsequently disavowed it on the basis that it was erroneous, the result of her lack of recollection of meeting Klemmer at the time she signed it. See: Supp. Brief, para. 9. Orion also relies on Utter's March 27, 1989, which Liberty has previously shown to be highly suspect. Although presented as a work of her own authorship, Utter's March 27, 1989 statement was entirely the product of the influence of Orion and reflects a substantially greater recollection of events than she was willing to affirm under oath. See: Supp. Brief, paras. 9-10. Utter's deposition testimony, which was the only sworn testimony that she did not disavow, establishes little more than the fact that she had little, if any, recollection of the events of her meeting with Klemmer and Warner. See: Supp. Brief, paras. 12-14.

7. Orion notes that Utter's deposition tells a story which is at odds in a number of respects with Klemmer's and Warner's description of their August, 1987 meeting with her. While Orion correctly characterizes Utter's testimony in this regard, what it fails to address is the fact that Utter made it abundantly clear that she had little recollection of the meeting. See: Supp. Brief, paras. 12-14. She may well have testified to the best of her ability, but she had little recollection upon which to base any testimony, and did not pretend otherwise. As Liberty has demonstrated, Utter was far less willing to commit herself on any particular fact under oath and, thus, her deposition testimony establishes little more than the

2. The Review Board based its disqualification of Liberty on the same demonstrably erroneous proposition. 6 FCC Rcd. 1978, 1979, para. 8.

fact that she had little if any recollection of what was discussed at her meeting with Klemmer and Warner. See: Supp. Brief, paras. 12-14. ³/

8. Orion argues that Utter's lack of recollection of her meeting with Klemmer and Warner does not compare favorably with her recollection of the other people who called her. (Liberty Ex. 13, pp. 21-22) However, all her testimony reflects in this regard are the most general comments to the effect that a number of people called her, none came up to her house, she told them she was not interested and that she told Becky Wabich that she was not interested in selling her property. Other than the call from Wabich, none of these comments reflects a detailed recollection of any specific event.

9. Orion makes much of the fact that Klemmer did not advise Utter that she would be "specifying her name" in Liberty's application. However, Utter was advised that Klemmer would be specifying a site on her property and Warner testified that she was reasonably familiar with the application process. (Tr. 883, 885-86)

10. Arguing that Utter's testimony was reliable, Orion simply asserts that there were few relevant inconsistencies in her testimony. Yet, it makes no effort, whatsoever, to address the numerous examples Liberty has offered, which demonstrate that Utter's testimony was not reliable or credible. See: Supp. Brief, paras. 11-14.

11. Contrary to Orion's claim, Liberty did not "make much of" the fact that Utter did not recall meeting Klemmer at the time she signed the February 22, 1989 Affidavit, but simply demonstrated that she had subsequently disavowed it on the basis that it was not true, obviating any possibility that it could support any findings in this proceeding. Supp. Brief, para. 9.

3. It is certainly plausible, given Lee's lease and Utter's statements that he was unhappy with her discussing leasing Klemmer a site, that Utter simply elected not to recall anything that might get her in trouble with Lee. No serious review of the facts can disregard this possibility.

12. Orion takes issue with Liberty's contention that Utter felt pressured by Lee and that Orion's (former) counsel attempted to put words in her mouth. Orion asserts that it was Warner who Utter identified as being "adamant" about the fact that Klemmer had discussed a lease with her in 1987. However, unlike Orion's involvement and influence over Utter's March 27, 1989 statement, Warner did not tell her what to say, did not suggest the wording and was not present when her March 13, 1989 statement was prepared and signed. (Liberty Ex. 13, pp. 38-40; Tr. 915-16) Furthermore, Utter not only acknowledged in her March 13, 1989 statement that she had discussed leasing Klemmer a site in August, 1987, she also acknowledged that fact to Lee. (Liberty Ex. 7; Tr. 2499-2502)

13. Contrary to Orion's claim (at p. 6), Liberty did present evidence that Utter felt pressured by Lee and that Orion attempted to influence the substance of her testimony. Utter told Warner in 1989 that Lee had a problem with the fact that she had discussed leasing a site to anyone else. (Tr. 928) Utter acknowledged in her deposition testimony that Orion's (former) counsel not only told her what to say but also suggested some of the specific language incorporated into the March 27, 1989 statement. (Liberty Ex. 13, pp. 49-50) ⁴/ Utter acknowledged that she did not see any need for a third statement and even Lee was unable to explain why the third statement was necessary to clear up confusion that had already been cleared up. (Liberty Ex. 13, pp. 51; Tr. 2496-97) Furthermore, the fact that Lee got Utter to add a statement at the last minute, indicating that she was not being pressured, suggests that precisely the opposite was the case. (Tr. 2494-95)

4. Orion's attempt to equate its attempt to influence Utter's testimony, so as to secure the disqualification of a competing applicant, with the preparation of Warner's hearing testimony is ludicrous. Warner testified that he provided the raw material for his written testimony, which was then organized by Liberty's counsel and that he edited it and had it revised before he signed it. (Tr. 965-66)

14. As Orion correctly notes (at p. 7), precedent requires that a finding of misrepresentation be predicated upon evidence of willful intent to deceive. However, Orion does not even attempt to demonstrate the existence of any willful intent to deceive on the part of Klemmer. Instead, Orion suggests that intent should be inferred on the basis of some motive for deception. The motive Orion suggests, here, arises out of the combination of Klemmer's need to specify a site and Orion's contention that she "had no realistic choice", but to specify Utter's property.

15. Orion's claims regarding the existence of motive cannot withstand even cursory scrutiny. Reduced to its essence, Orion's argument consists of the following premises and conclusion:

1. Liberty needed a technically feasible site.
2. There were few technically feasible sites available.
3. Utter's site was technically feasible.
4. Liberty contacted no one but Utter.
5. Therefore, Liberty "had no realistic choice" but to specify Utter's property as its site.

This argument must fail both because it is fallacious and because two of its premises require significant qualification to avoid being misleading.

16. The argument is fallacious because the conclusion does not follow from the premises. Fatal to the argument is the fact that, while Klemmer may not have contacted anyone but Utter, Orion has not shown that she could not have done so, had there been any need to do so. Thus, a necessary premise is missing: that Utter's site was the only site available. Orion could not make this assertion, because there is no evidence to support it.

17. On the contrary, while there may have been "few" technically feasible sites and while Warner clearly viewed Utter's property as the best, these facts do not establish that there were no other feasible sites available to Klemmer. The facts of the case preclude such a finding. There were 13 applications accepted for tender in this proceeding, which proposed a

total of 11 different transmitters sites. See: Public Report No. 14025, released October 15, 1987, pp. 5-6. More importantly, two applicants specified the existing tower on Utter's property, Skyland Broadcasting Company (File No. BPH-870830ML) and Ernest J. Phillips (File No. BPH-870830MH) in 1987. (Official Notice Requested) Thus, there can be little question that Klemmer also could easily have secured permission in 1987 to specify the existing TV tower, as she did in 1989 prior to filing Liberty's site relocation amendment.

18. Likewise, the fact that Klemmer did not contact anyone other than Utter must be considered in context. Because Warner considered Utter's property to be the best and recommended constructing a new tower, rather than using the shorter TV tower which might have to be taken down, Klemmer contacted Utter first. While Klemmer could have contacted other site owners, she had no reason for doing so, once Utter had agreed to lease her a site, if her application were granted. Thus, rather than supporting the claim that she had "no realistic choice" but to specify Utter's property, the fact that Klemmer did not pursue any other site provides further support for Liberty's contention that, as of the date she signed Liberty's application, Klemmer believed she had obtained reasonable assurance of the availability of a site on Utter's property.

19. Orion's suggestion (at p. 7) that Klemmer and Warner attempted to convert Utter's lack of memory into reasonable assurance is ludicrous. Utter's recollection went from 'I never met her', to 'I met her and discussed leasing her a site, but I never heard from her again', to 'all I recall is chit-chatting about Brian Lee.' Given the nature of its evolution, if Utter was persuaded to change her testimony, it was not by Klemmer or Warner.

20. Orion contends (at Note 15) that Warner was not a disinterested witness, as Liberty claims. However, Orion fails to offer any evidence of any interest on his part. The ALJ explored this issue at hearing and discovered that Warner had no interest in Liberty's application, had been

offered no interest and that there had never even been any discussion of any interest or of him being employed at the station or providing ongoing services. (Tr. 951-52, 966, 973)

21. Orion's discussion (at p. 8) of a series of cases relating to "credibility findings" is irrelevant. The ALJ made no credibility findings regarding Klemmer's testimony, much less that of Warner (who he ignored), and neither Orion nor any other competitor of Liberty has even attempted to point to any such findings in the the ID.

22. However, even had the ALJ made adverse credibility findings regarding Klemmer's testimony, there are two "irreconcilable conflicts" which would preclude any possibility that those findings could be accorded any weight: (1) the fact that he pre-judged the added issues prior to hearing and (2) the fact that he ignored Warner's corroborating testimony, thus, precluding the possibility of any adverse findings regarding his credibility. Because Warner's testimony corroborated that of Klemmer, the ALJ could not reasonably have made credibility findings regarding the testimony of one, but not the other. The ALJ knew he could not call Warner a liar or otherwise attack his credibility, so he simply ignored him. Not only does this preclude consideration of any credibility findings he might have made, it undermines his entire ruling on the added issues. The problem is that Commission decisions must be supported by substantial evidence, based upon the record as a whole. Warner's testimony precludes the ALJ's findings and conclusions (and the Review Board's decision) from meeting that test.

23. Although Orion demonstrates that it recognizes the applicable standard to be applied in addressing a misrepresentation issue and what must be proven, it has failed to point to any evidence, whatsoever, that Klemmer willfully intended to deceive the Commission when she certified as to the

availability of a site on Utter's property in 1987.

Respectfully Submitted

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CERTIFICATE OF SERVICE

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